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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
1998 Biennial Regulatory Review - -	)	CS Docket No. 98-54
	)	
Part 76 - Cable Television Service Pleading and Complaint Rules	)	
	)	

To: The Commission

COMMENTS

The Wireless Communications Association International, Inc. ("WCA") hereby submits its comments with respect to the Commission's *Notice of Proposed Rulemaking* (the "*Biennial Review NPRM*") issued on April 22, 1998 (FCC 98-68) in the above-captioned proceeding.[1/]

I. INTRODUCTION.

WCA generally supports the Commission's effort to harmonize the pleading and complaint rules for certain Part 76 proceedings which directly or indirectly affect the interests of wireless cable operators. In some cases, the current rules establish different pleading cycles for similar types of proceedings, creating unnecessary confusion without any countervailing

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[1/] WCA, formerly known as The Wireless Cable Association International, Inc., is the principal trade association of the wireless cable industry. Its membership includes virtually every wireless cable operator in the United States; the licensees of many of the Multipoint Distribution Service ("MDS") stations and Instructional Television Fixed Service ("ITFS") stations that lease transmission capacity to wireless cable operators; producers of video programming; and manufacturers of wireless cable transmission and reception equipment. As discussed in greater detail herein, WCA's membership has a vital interest in the *Biennial Review NPRM* insofar as it implicates Part 76 proceedings in which wireless cable operators are eligible to participate.

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benefits to the public. Thus, WCA herein recommends certain minor modifications to the Commission's Part 76 rules which it believes will eliminate these inconsistencies.

By the same token, however, WCA submits that the Commission should refrain from considering any rule modifications which are already the subject of other pending rulemakings or which would otherwise fundamentally alter the legal rights of cable's competitors in Commission proceedings. Most significantly, and as set forth in the Commission's *Memorandum Opinion and Order and Notice of Proposed Rulemaking* in CS Docket No. 97-248 (the "*Program Access NPRM*"),[2/] the Commission has already proposed to amend its pleading and evidentiary rules for program access complaints (47 C.F.R. § 76.1003), and has developed a detailed record as to what amendments would best serve the public interest. Moreover, the issues raised in the *Program Access NPRM* bear significantly on the substantive program access rights of cable's competitors, and thus extend far beyond the more limited, technical issues raised in this proceeding. Accordingly, WCA asks that the Commission maintain a strict separation between the two proceedings and modify Section 76.1003 of its Rules only in connection with the proposals set forth in *Program Access NPRM.*

Finally, the Commission has solicited comment as to whether it should harmonize the various burdens of proof for different types of Part 76 proceedings. WCA submits that regardless of whatever other rule modifications the Commission may adopt in this proceeding, the Commission should *not* alter a cable operator's burden of proving that its programming contracts

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[2/] FCC 97-415 (rel. Dec. 18, 1997).

comply with the Commission's program access rules, that it is subject to effective competition (47 C.F.R. § 76.906) or that its bulk rates for multiple dwelling units ("MDUs") are not predatory (47 C.F.R. § 76.984(c)(2)). In each instance, the cable operator's burden of proof arises largely from the fact that cable operators are the dominant providers of multichannel video service in virtually all markets, and usually are in sole possession of the information necessary to establish whether the Commission's rules have been violated. Absent a sudden and dramatic reduction in the cable industry's enormous economic power in local markets, there is no reason for the Commission to shift the cable operator's burden of proof in these types of cases.

II. DISCUSSION.

A. The Commission Should Amend Certain of Its Part 76 Pleading Requirements To Achieve Greater Consistency Between Pleading Cycles in Similar Types of Proceedings.

Aside from program access complaints (see discussion at Section II(B), *infra*), the Part 76 procedures which most often implicate wireless cable operators are those which apply to cases where the petitioning party is seeking some sort of special relief from the Commission, under either the generic special relief procedures set forth in Section 76.7 or the more matter-specific procedures set forth in other sections of Part 76. Not all Part 76 special relief proceedings, however, have the same pleading cycles. For example, where a wireless cable operator files a complaint alleging that an incumbent cable operator has violated the Commission's uniform pricing provisions (47 C.F.R. § 76.984), the cable operator's opposition

is due within twenty days from public notice.[3/] Conversely, where an incumbent cable operator files a petition requesting a determination that a wireless cable operator qualifies as effective competition, the wireless cable operator's opposition is due within only fifteen days of public notice (twenty days where the wireless cable operator is affiliated with a local exchange carrier).[4/]

WCA believes that the simplest way to conform all of the above-described pleading cycles is to adopt a single pleading cycle that will apply to *any* special relief petition filed under Part 76 of the Rules, excluding program access complaints filed under Section § 76.1003. More specifically, WCA recommends that the Commission adopt a uniform Part 76 pleading cycle that (1) would apply to any petition for special relief that is not a program access complaint, and (2) would require that all oppositions be filed within thirty days of public notice, with ten days for replies. This type of pleading cycle is already widely used in the broadcast context (*see, e.g.*, 47 C.F.R. § 73.3584) and provides opposing parties ample time to gather their evidence and submit their arguments to the agency, without materially compromising the Commission's broader objective of processing contested matters as quickly and thoroughly as possible. Furthermore, a single, uniform pleading cycle would eliminate the confusion inherent to applying different pleading cycles to similar types of Commission proceedings, and thus will better serve the public interest.

[3/] 47 C.F.R. § 76.7(d), (e).

[4/] *Compare* 47 C.F.R. § 76.915(f) with *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 5937, 5944 n.28 (*citing* 47 C.F.R. § 76.7).

B. Separate Procedural Rules Are Appropriate For Program Access Complaints, and Thus Section 76.1003 Should Not Be Modified Except In Accordance With The Program Access NPRM.

At paragraph 3 of the *Biennial Review NPRM*, the Commission lists "program access adjudicatory proceedings" under Section 76.1003 as being among the proceedings eligible for modification under the Commission's biennial review of Part 76. For the reasons set forth below, WCA submits that the procedures set forth in Section 76.1003 should be excluded from this proceeding, and that any amendments to that rule should be considered only in connection with the *Program Access NPRM.*

As noted in WCA's comments filed in CS Docket No. 97-248, it is well known that cable-affiliated programmers are taking advantage of loopholes in the Commission's program access complaint procedures solely to delay or avoid selling their programming to wireless cable operators and other alternative multichannel video programming distributors ("alternative MVPDs").[5/] Accordingly, the Commission has made a variety of proposals in the *Program Access NPRM* that are designed to close these loopholes and facilitate more expeditious resolution of program access complaints. Those proposals include (1) requiring program access complaints to be resolved by the Commission within a specific period of time; (2) shortening the pleading cycles set forth in Section 76.1003; (3) giving program access complainants a right to mandatory discovery; and (4) providing successful program access complainants with a damages

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[5/] *See, e.g.,* Comments of The Wireless Cable Association International, Inc., CS Docket No. 97-248, at 7-19 (filed Feb. 2, 1998).

remedy.[6/] The comment and reply cycle for the *Program Access NPRM* closed just four months ago, and thus the Commission already has before it a current and detailed record as to what amendments to Section 76.1003 would be appropriate. It therefore would make little sense for the Commission to repeat the effort and consider any amendments to Section 76.1003 in *this* docket, particularly given the risk that any action here might conflict with any action taken in the *Program Access NPRM.*

Furthermore, as previously recognized by the Commission, there is a substantial public interest basis for maintaining a separate and distinct procedural framework for program access complaints. It is now undisputed that alternative MVPDs cannot survive without full and fair access to programming,[7/] and that special complaint procedures are necessary to ensure that alternative MVPDs have as much opportunity as possible to resolve program access disputes informally and, where such efforts fail, bring a program access complaint before the Commission.[8/] Accordingly, the Commission has, for example, provided program access

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[6/] *See Program Access NPRM at* ¶¶ 38-40, 41-44, and 45-46.

[7/] *See, e.g.,* Separate Statement of Chairman William E. Kennard re: *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, FCC 97-243 (rel. Jan. 13, 1998) ["New entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and effectively."].

[8/] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 (Development of Competition and Diversity in Video Programming Distribution and Carriage)*, 8 FCC Rcd 3359, 3362 (1993) ["In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public. . . [W]e are promulgating complaint procedures carefully designed to provide

complainants with a one-year statute of limitations and, in certain situations, provided for status conferences and allowed for supplemental briefing on specific legal issues.[9/] Given the Commission's acknowledgment that program access is still a critical issue for cable's competitors and thus requires rigorous enforcement, there is no reason for the Commission to now step away from that position and take any action here that would modify the current program access complaint procedures beyond what has been proposed in the *Program Access NPRM*.

C. *The Commission Should Not Alter A Cable Operator's Burden of Proof in Program Access Cases, Nor Should It Alter A Cable Operator's Burden of Demonstrating That It Is Subject To Effective Competition and In Compliance With The Commission's Uniform Pricing Rules.*

At paragraph 4 of the *Biennial Review NPRM*, the Commission requests comment on whether it is appropriate to impose different burdens of proof in various types of Part 76 proceedings. WCA submits that regardless of how the Commission chooses to address this issue, it should not alter a cable operator or cable programmer's burden of proof in program access cases, nor should it alter a cable operator's burden of proof in matters relating to effective competition or compliance with the Commission's uniform pricing rules for the MDU environment.

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effective relief by placing the least necessary evidentiary burdens on those seeking relief under our program access rules and ensuring a speedy resolution of their complaints."] [the "*Program Access First Report and Order*"]. Indeed, the cable industry itself recommended that the Commission adopt a complex program access complaint process that more closely resembles civil litigation. *Id.* at 3388 n. 97.

[9/] 47 C.F.R. § 76.1003 (i)-(h), (r).

Under the Commission's current program access rules, a cable operator or cable programmer bears the burden of establishing that it has not entered into prohibited exclusivity arrangements once the complainant has made out a *prima facie* case.[10/] In addition, cable operators are presumed not to be subject to effective competition, and thus bear the burden of demonstrating that such competition exists.[11/] Similarly, where a wireless cable operator presents a *prima facie* case that a cable operator's bulk rates for MDUs are predatory, the cable operator bears the burden of demonstrating that its discounted rates are not predatory.[12/] In each instance, the cable operator or programmer's burden of proof arises by virtue of the fact that cable operators enjoy enormous economic power in local markets, and invariably are in exclusive possession of the information necessary to establish whether the Commission's rules have been violated.[13/] As a result, it would be next to impossible for an alternative MVPD to sustain a program access or uniform pricing complaint if it were required to bear the entire burden of

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[10/] *Program Access First Report and Order*, 8 FCC Rcd at 3390. Similarly, in cases involving price discrimination, the cable operator or programmer bears the burden of demonstrating compliance with the Commission's discrimination rules where the complainant has made out a *prima facie* case. *See id.* at 3417-18.

[11/] 47 C.F.R. §§ 76.906, 76.915(a).

[12/] 47 U.S.C. § 543(d); 47 C.F.R. § 76.984(c)(2).

[13/] *See, e.g.*, Letter from William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 11 (Jan. 23, 1998) ["As the issues involved in price discrimination cases become more complex and sophisticated, greater amounts of discovery and resources are necessary to fairly resolve such matters. In many price discrimination cases, discovery will be essential . . . ."]; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation*, 8 FCC Rcd 5631, 5671 (1993) ["Cable operators are in a better position than franchising authorities or the FCC to ascertain their competitors' availability and subscribership . . . Moreover, as competitors, [cable] operators will be motivated to bring all competitive facts to light."].

proving that a rule violation has occurred. Hence, there are significant public interest reasons why cable operators and programmers bear the burden of proof in program access and uniform pricing cases, and it therefore would amount to a substantial reversal of policy for the Commission to shift those burdens solely for the purpose of conforming its various Part 76 rules to each other. Moreover, a cable operator's burden of proof in "predatory pricing" cases is statutory and thus cannot be amended by the Commission in any case.[14/] WCA therefore requests that the Commission stay the course of promoting competition to cable and leave these burdens of proof intact.

III. CONCLUSION.

In sum, WCA believes that the Commission should adopt a proactive but cautious approach when considering any amendments to achieve greater consistency between its Part 76 procedural requirements. Though certain conforming changes would alleviate unnecessary confusion as to what rules apply to the various types of Part 76 proceedings, the Commission should not attempt to "conform" any procedural rules that are already under consideration in other Commission proceedings or otherwise have a well-established and unique public interest basis that remains valid to this day. WCA thus recommends that the Commission adopt the limited rule modifications suggested above, and explicitly exclude Section 76.1003 and the

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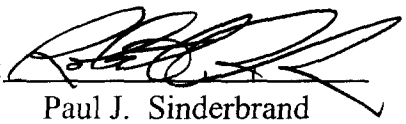
[14/] 47 U.S.C. § 543(d).

burdens of proof discussed above from that process.

WHEREFORE, The Wireless Communications Association International, Inc. respectfully requests that the Commission resolve the issues raised in the *Biennial Review NPRM* in accordance with the comments set forth above.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: 

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